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# The Right to Private Property and its Enforcement: the Changing Public-Private Divide in the PRC

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TING XU \*

## THE CONSTITUTION AND THE RIGHT TO PRIVATE PROPERTY

Litigating the Constitution is very difficult in the People's Republic of China (PRC), as it is not justiciable and there is no separation of powers, either as doctrine or as practice. However, the post-Mao legal reforms have slowly helped to create new attitudes among Chinese legal professionals and theorists. And in the wake of the 1999 amendment to article 5 of the Constitution, in which the PRC committed itself to 'governance in accordance with the rule of law', significant attempts were made to challenge the Constitution's non-justiciability, including the use of civil suits.<sup>1</sup> The attempt to broaden the role of the Constitution so that it meaningfully protects the private rights of citizens is an attempt to overcome a problem of 'empty' constitutional rights in post-Mao China, and to create instead a system of genuinely enforceable constitutional entitlements.<sup>2</sup>

There is one important area of constitutional rights in contemporary China that has not yet been properly considered, however: the issue of the right to private property and its enforcement. This problem has received only limited attention by Chinese scholars and practitioners. The question is: in the contemporary legal system, can Chinese people defend their private property rights, newly incorporated into the 2004 Constitution as one kind of constitutional right, when infringed? To answer this question, we need to examine

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<sup>1</sup> For example, *QI Yuling v. CHEN Xiaoqi*. Qi and Chen took the same entrance examination for higher education. Qi passed, but Chen failed. However, arranged by Chen's father, a local cadre, Chen took Qi's identity and received a place in a college. After 11 years, Qi discovered the truth and started legal suits against Chen for infringement upon Qi's identity and rights to education. The Supreme People's Court's (SPC's) interpretation supported Qi's claims for her constitutional rights to education and, instructed by the SPC, the provincial court ruled in her favour. The SPC's 2001 interpretation in this case is seen as a milestone in Chinese constitutionalism and regarded as 'China's first constitutional case'. However, the attempts (most are indeed from the grassroots) of the judicialisation of the Constitution (*xianfa sifa hua*) have been suppressed. On 18 December 2008, the SPC withdrew its 2001 interpretation, and it was 'no longer applied'. Instead, it is officially declared that judicial decision-making should be made in terms of the 'three supremes' (*sange zhishang*): party interests, public opinion and legal rules.

<sup>2</sup> See CAI Dingjian (2005) 'Zhongguo xianfa sifahua lujing tansuo' ('The Exploration of the Path towards the Judicialisation of the Constitution in China') *Faxue yanjiue* (*The Legal Study*) 5 at 110.

the nature of private property rights, remedies provided for violation of private property rights and the barriers preventing protection of property rights through litigation in the courts in China today. In so doing, the article will also consider the changing nature of the public-private divide in Chinese law and society.

## THE REVIVAL OF PRIVATE PROPERTY RIGHTS AND THE CASE OF 'THE MOST STUBBORN HOUSE OWNER'

In China the private (*si*) has long been considered inferior to the public (*gong*). The advent of socialist rule in 1949 brought significant changes to the official conception of property, including an intensification of this inferiority. Between 1956 and 1978, 'private' was often characterised as 'evil' and was virtually abolished. Since 1978, after almost three decades of this,<sup>3</sup> a 'revival' of private property has been set in motion by market reforms in three ownership sectors, conceptualised in the PRC as relatively distinct: that is, first, through the processes of dismantling rural communes, secondly, the acceptance of private enterprise and the reform of state-owned enterprises, and thirdly the emergence of urban property markets. Along with these processes, the status of private ownership has been increasingly, albeit gradually, recognised by law. This can be seen in various constitutional amendments. Up to 2004, amendments pertaining to the selective rehabilitation of the 'private' included: acknowledgement of the 'individual economy' (*geti jingji*) (1982); acceptance that a private economy (*siying jingji*) would be allowed to develop within the limits prescribed by law; recognition of urban land use rights transfer (1988); establishment of a 'socialist market economy' (1993); acceptance of the individual and private economy as important components of the socialist market economy (1999); and finally recognition of important private property rights. Since 2004, private property rights have become one kind of constitutional right. The Property Law that came into effect in 2007<sup>4</sup> defines ownership as an absolute and supreme right in China, and equal protection for public and private property is stipulated in the law for the first time since 1949. It also gives a clear demarcation of state ownership, collective ownership and private ownership. Enforcement of the Property Law may seem to provide ordinary people with remedies through civil litigation when there is infringement of their private property rights.

Yet private property rights are still vulnerable in various ways. Despite constitutional guarantees, it is difficult to protect private property rights through the Chinese legal system. Indeed, very soon after the passing of Property Law by the National People's Congress (NPC) in 2007, the case of 'China's most stubborn house owner' (literally, 'the nailed down house', *dingzi hu*, meaning a stubborn household that is difficult to coerce)<sup>5</sup>

<sup>3</sup> Private ownership was not formally abolished in 1949, and a mixed economy was adopted between 1949 and 1956 as a prelude to nationalisation of private capital. Whether or not a complete system of public ownership was established is unclear. For example, art 11 of the 1954 Constitution recognised private property: 'the State protects the right of citizens to own lawfully-earned incomes, savings, houses and other means of life'; and art 12 provides: 'the State protects the right of citizens to inherit private property according to law'. Art 11 of the 1954 Constitution was restated in art 9 of the 1975 Constitution, but 'the right to inherit private property' was abandoned.

<sup>4</sup> The Property Law was promulgated by the National People's Congress (NPC) on 16 March 2007, and implemented on 1 October 2007.

<sup>5</sup> The name refers to local residents who refuse the local government's order to move out of their homes for settlement. These households are usually forcibly relocated to make way for commercial projects, and are

generated heated debate on the issue of enforcement of the Property Law and protection of private property rights.<sup>6</sup>

This case concerned a couple resident in Jiulongpo District of Chongqing, Ms Wu Ping and Mr Yang Wu. The couple refused to move out of their house in order to make way for a commercial project, even after the district court issued a judgment of forced eviction against them and when the construction work around their house turned their residence into an islet. The couple placed a Chinese national flag on the roof of their house with a hand-painted banner proclaiming: 'a citizen's legal property is not to be encroached upon' (*gongmin hefa de siyou caichan burong qinfan*). The 'islet' stood alone in a 20-metre deep man-made pit, and all utilities supplies were cut off.<sup>7</sup>

This case was seen as the first test of the guarantees of private property rights in China offered by the new Property Law and by the Constitution.<sup>8</sup> However, in reality the case is not particularly novel: it is just one of the innumerable instances in which private houses and apartments have been demolished by government-backed development projects with residents offered unfair compensation and suffering forced eviction. Although the Wu family resisted these pressures for a while, they eventually gave up and accepted the compensation offered by the developers through mediation by the court and the local government. Their house was then demolished.<sup>9</sup>

The problematic issues in this case include, in particular, the correctness of the legal and administrative procedures used to secure agreement for demolition (the 'due process' of demolition) and the basis of the judgment on the case handed down by the Jiulongpo district court (the court of first instance) in Chongqing. A detailed examination of the case shows obvious conflicts between national legislation and local regulations, and between local judicial authority and the protection of civil rights. The district court's judgment was based on a local regulation which is clearly divergent from national legislation — that is, there are clear conflicts between the 'Regulations for Management of Urban Residential Demolition and Eviction' issued by the State Council and those of Chongqing Municipality.<sup>10</sup> In addition, according to articles 12, 13 and 58 of the Land Administration

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compensated by property developers or local governments. But usually the compensation is not adequate, and this is the main source of conflicts between the residents and property developers. The residents refuse to move, even though construction is proceeding around their home. Before this case, 'dizi hu' was often used as a negative term referring to a 'trouble-maker'. But here it has a more positive meaning, referring to people who are brave enough to protect their property rights against external encroachment.

<sup>6</sup> The images and reports of the house were headlines in newspapers, and discussions about the case flooded internet chat rooms. There were also different translations for the name of the case: in addition to 'the most stubborn house owner', others included 'the most unco-operative house owner', 'the coolest' and 'the most persistent'.

<sup>7</sup> See ZHENG Zhu (2007) 'Dingzihu weihe zheyang niu?' ('Why is the Nail House owner so stubborn?') *Zhongguo xinwen zhouban* (Chinese News Weekly) 30 March, available at: <http://news.sina.com.cn/c/2007-03-30/140912655314.shtml>.

<sup>8</sup> See NI Ching-Ching (2007) 'A Tall Stand for Property Rights in China' *Los Angeles Times* 30 March, available at: <http://www.latimes.com/news/nationworld/world/la-fg-nailhouse30mar30,1,3954342.story?ctrack=1&cset=true>.

<sup>9</sup> The outcome of the dispute is discussed in ZHANG Jialin (2007) "'Chongqing zuiniu dingzihu jianzhu" yi bei chai chu' ("The house of the most stubborn house owner" in Chongqing has been demolished') *Renmin wang* (People.com) 2 April, available at: <http://society.people.com.cn/GB/1062/5553732.html>.

<sup>10</sup> For example, art 7 of State Council 'Regulations for Management of Urban Residential Demolition and Eviction' (2001) and art 10 of Chongqing 'Regulations for Management of Urban Residential Demolition and Eviction' (2003). The latter does not stress the approval documents regarding state-owned land use rights as a condition to proceed with housing demolition.

Law, amended in 2004,<sup>11</sup> the procedure for demolition should be that the local government requisitions the land use rights (LURs) owned by the former residents and changes the land registration record, and then the local government sells the LURs to the developers. Developers may then apply for approval of demolition and proceed to construction. However, in ‘the most stubborn house owner’ case, the district government did not requisition the LURs and amend the recorded land registration before it sold the LURs to developers, and the developers carried out the demolition without the necessary state-owned land use rights certificate (*guoyou tudi shiyongquan zheng*). Using a metaphor to describe this situation, local people characterised the problem as one in which the district government ‘married the daughter twice’ (*yi nü er jia*).<sup>12</sup> In this situation, even though article 4 of the Property Law states that ‘private property shall not be infringed upon’, it proved impossible for the owners of the house to assert their rights through the Property Law or the Constitution, so that we can see an obvious lack of enforceability of both of these.<sup>13</sup> When the district government infringed the Constitution and the Property Law, residents could only refer to general principles to claim their rights, but where were the specific mechanisms of enforcement? So, the question becomes: why is the enforceability of the Property Law and the Constitution so difficult? Let us focus on the land rights.

### STRONG PUBLIC POWER AND VULNERABLE PRIVATE PROPERTY RIGHTS

The precise identity of the holders of ownership rights of both urban and rural property in land is unclear. While state-owned land may be leased through the LUR system, the ‘state’<sup>14</sup> retains its ownership of urban land and the ‘collective’ maintains its ownership of rural land; indeed, it is often unclear who owns rural land in China: the farmers themselves, collective economic organisations or local governments. In these circumstances, the extent to which the Chinese people ‘own’ private property in land is uncertain. Land use rights are vulnerable to compulsory requisition by the state, and ordinary owners do not have security for their property. Partly as a result of this lack of clarity, house demolition (*chai qian*) in urban China, and land seizure in rural areas, have become major problems, generating much social unrest and even riots in contemporary China. This section focuses on vulnerable property rights in relation to land requisition and on forced eviction as one of the major sources of land disputes and conflict.

#### Land Acquisition and Compulsory Requisition of Land Use Rights

Private property rights in land and housing are susceptible to land acquisition (*tudi zhengshou*) and the requisition of LURs (*tudi shiyongquan zhengyong*). Both the Chinese

<sup>11</sup> Amended version was promulgated and in force on 28 August 2004.

<sup>12</sup> See DUAN Hongqing and WANG Heyan (2007) ‘Chongqing dingzihu shijian: meiyou yingjia de duizhi’ (‘The Case of the Nailed Down House in Chongqing: Confrontation without Winners’) *Caijing Magazine* 2 April, available at: <http://www.caijing.com.cn/newcn/ruleoflaw/other/2007-04-02/17498.shtml>.

<sup>13</sup> For example, it seems that art 4 of the Property Law is just a repetition of arts 12 and 13 of the Constitution.

<sup>14</sup> Here the question is who can represent the state: the central government or local governments?

Constitution<sup>15</sup> and the Land Administration Law<sup>16</sup> specify that the state, *in the public interest*, may lawfully acquire land owned by collectives. This sets the stage for compulsory land acquisition.<sup>17</sup> The Land Administration Law states that compensation shall be given in accordance with the original use of the acquired land,<sup>18</sup> and it is to be calculated as a package that includes compensation for the land, resettlement subsidies and compensation for fixtures to, and young or 'green' crops on, the acquired land. Although article 42 of the Property Law expands the scope of compensation to include 'premiums for social security of the farmers' in order to guarantee their normal standard of living and to safeguard their lawful rights and interests, the compensation does not have to be paid at full market price. As a result, local governments may acquire rural land from farmers at a low price, sell it on to property developers at a much higher price and so make a great profit.<sup>19</sup> This is clearly unfair to the owners of private property, and quite inconsistent with the provisions of equal protection.

What 'public interest' (*gonggong liyi*) actually means is not at all clear in either the Constitution or the Property Law. Moreover, the Supreme People's Court has not as yet issued any interpretation to clarify the meaning of the terms 'public interest' or 'public use'. Mansions, golf courses and lavish government buildings are being established in many parts of China today in the name of 'public interest' and at the expense of productive agricultural land. Governments are ill equipped to address the issues that have emerged from land acquisition and requisition of LURs, often because their own interests are involved.

Moreover, because rural land is collectively owned, what farmers actually possess are only land use rights. When the state acquires ownership of rural land from rural collectives, the LURs of farmers are lost accordingly. In practice, land resumption in rural China is a requisition of the LURs of farmers for the purpose of urban development. Land requisition in urban China takes the form of housing demolition and forced eviction, and a requisition of the LURs of urban residents.<sup>20</sup> Compulsory requisition of LURs of (both rural and urban) land is stipulated in article 44 of the Property Law: 'for the purpose of emergency handling and disaster relief', real and movable properties of institutions or individuals may be reclaimed in line with the procedure and within the authority provided by law.

Also, after requisition of LURs, the reclaimed properties are to be returned to the owner. According to article 42(3) of the Property Law, when houses and other properties owned by farmers are acquired, compensation for demolition and resettlement must be paid, but there is no specific provision for compensation. Therefore farmers are vulnerable to the

<sup>15</sup> The Constitution (2004) art 10(3).

<sup>16</sup> The LAL (2004) art 2(4).

<sup>17</sup> *Zhengshou* is the compulsory acquisition of collective landownership; it is related to -- but different from -- *zhengyong*, which is taking of LURs. In this article *zhengshou* is translated as land acquisition, and *zhengyong* is translated as requisition of land use rights; land seizure is a general term that may be used to refer to both *zhengshou* and *zhengyong*, as well as illegal conversion of rural land to urban use.

<sup>18</sup> The LAL (2004) art 47.

<sup>19</sup> See Yeh, AG (2005) 'The Dual Land Market and Urban Development in China' in DING Chengri and SONG Yan (eds) *Emerging land and Housing Markets in China* Lincoln Institute of Land Policy at 43.

<sup>20</sup> Requisition of LURs of urban residents leads to housing demolition, according to a principle established in the law that LURs are inseparable from rights in the buildings, colloquially referred to as *fang sui di zou, di sui fang zou*. See the Urban Real Estate Administration Law (1994, revised 2007) art 32; the Guarantee Law (1995) art 36; the Property Law (2007) art 182.



associated problem of the predatory behaviour of local governments and cadres who seek to secure an illegal conversion of farmland to commercial and industrial projects.<sup>21</sup>

### Forced Eviction and Housing Demolition

Housing demolition in China today usually involves developers, demolition and eviction management departments (affiliated to local land administration bureaus), residents and a private demolition company (subcontracted by developers).<sup>22</sup> The State Council's 'Regulations for Management of Urban Residential Demolition and Eviction' (the 2001 Regulation)<sup>23</sup> provides the procedures through which local governments may evict residents' houses and apartments. *Qiangzhi chaqian* (forced eviction) is provided in article 17: city and county governments may ask relevant departments (often through the demolition and eviction department) to proceed with forced eviction, or the demolition and eviction management department may apply for an order of forced eviction by the people's court, even when residents (including both homeowners and tenants) refuse relocation. In reality, there is an obvious failure to provide adequate compensation, due process and effective remedies. Forced eviction in most cases has been transformed into what has been called in China 'violent eviction' or 'savage eviction' (*yeman chaqian*), involving cutting off water and electricity, physical harassment and assault, breaking into properties and even arson, often carried out by secret societies and other thuggish elements.<sup>24</sup>

The 2001 Regulation is an administrative norm which conflicts with provisions of the higher-level laws. For example, the Constitution (amended 2004, article 13), the Property Law (2007, articles 42 and 44) and the Urban Real Estate Administration Law (1994, article 19) stress 'public interest' as the reason for land acquisition, and 'emergency handling and disaster relief' as the reason for requisition of LURs. But article 7 of the 2001 Regulation does not specify either 'public interest' or 'emergency handling and disaster relief'. Requisition of LURs in the 2001 Regulation is in reality the taking of properties through administrative means (*xingzheng shouduan*).<sup>25</sup> Furthermore, in the requisition of LURs, the property rights of evictees are often ignored; no mechanism is provided for negotiation between evictees and developers, nor between evictees and local governments; compensation standards in

<sup>21</sup> See CAI Yongshun (2003) 'Collective Ownership or Cadres' Ownership? The Non-Agricultural Use of Farmland in China' *The China Quarterly* 662-80.

<sup>22</sup> Davis, MS and LIN Hai (2004) 'Demolished: Forced Evictions and the Tenants' Rights Movement in China' 16 *Human Rights Watch* 4 available at: <http://www.hrw.org/reports/2004/china0304/index.htm>.

<sup>23</sup> Chengshi Fangwu Chaqian Guanli Tiaoli (Regulations for Management of Urban Residential Demolition and Eviction) promulgated by the State Council on 22 March 1991, implemented on 1 June 1991. This regulation was revised and promulgated by the State Council on 6 June 2001, implemented on 1 November 2001. After the implementation of the Property Law (2007), the implementation of provisions in the 2001 Regulation that contradict the Property Law has been terminated. But the Property Law does not specify procedures of housing demolition or enforcement of the law. The amendment of the Urban Real Estate Management was adopted by the standing committee of the NPC on 30 August 2007, but the amendment still grants power to the State Council to promulgate regulations concerning housing demolition and compensation standards.

<sup>24</sup> See eg Pan, PP (2005) 'Chinese Peasants Attacked in Land Dispute' *Washington Post* 15 June. See also Griffiths, D (2005) 'China Faces Growing Land Disputes' *BBC News*, available at: <http://news.bbc.co.uk/2/hi/asia-pacific/4728025.stm>. On reports on Chinese media, see eg a special edition available at: <http://news.qq.com/z/2005/hebeiding/index.htm>.

<sup>25</sup> This also infringes the provisions of the Lifa Fa (The Legislation Law of the PRC), promulgated by the NPC on 15 March 2000 and in force on 1 July 2000. Art 79 of the Legislation Law provides: 'National Law has higher authority than administrative regulations.'

most cases are low; there is a lack of judicial remedies, so that for example, even if plaintiffs win a lawsuit, their home may have already been demolished.

The conflict between regulations and laws such as between the 2001 Regulation and the higher-level laws in present-day China should be understood in the context of urbanisation and the housing reform. The 'Regulations for Management of Urban Residential Demolition and Eviction' first emerged in 1991 (revised in 2001) and worked as a supplement to the Urban Planning Law,<sup>26</sup> in order to encourage urban construction and improve the living conditions of urban residents. But the pace of housing reform and housing commodification has accelerated since the 1990s, and commercial property developers have monopolised housing construction and provision, and have often formed a partnership with local governments. As a result, the 2001 Regulation seems to have met the needs of commercial developers but ignored the interests of urban residents. Developers may apply for housing demolition certificates from local governments, and if developers and residents cannot agree local governments will decide whether or not residents should be relocated. If they are ordered to relocate but still refuse to move, the local government or the court will proceed with forced eviction, even though this clearly contravenes the higher-level laws.

## LAWS, REGULATIONS, TREATIES AND THE COURT SYSTEM

In contemporary China, there is a significant body of law that provides protection for property rights. Within the overarching constitutional structure, the legal fabric concerning property issues consists of three levels. The first level is the General Principles of Civil Law (1986), which is the fundamental item of legislation for China's civil law system and the equivalent of the general section of a Civil Code.<sup>27</sup> But it does not contain detailed rules pertaining to contract, tort and property.

Before the Property Law came into effect in 2007, provisions related to property were dispersed in various 'independent' civil, commercial and property administration laws, which constitute the second level of regulation. They included the Company Law (1994),<sup>28</sup> the Guarantee Law<sup>29</sup> (1995), the Marriage Law<sup>30</sup> (1980, revised 2001) and the Inheritance Law (1985).<sup>31</sup> A Rural Land Contracting Law,<sup>32</sup> passed in 2002, opened the way for commodification of rural land transfer for agricultural purposes. Property administration laws include the Land Administration Law<sup>33</sup> (1986, revised 1988, 1998 and 2004), and the Urban Real Estate Administration Law<sup>34</sup> (1994, amended 2007). The third level includes provisions in administrative regulations such as 'the Provisional Regulations on the Grant

<sup>26</sup> Chengshi Guihua Fa, promulgated on 26 December 1989, implemented on 1 April 1990.

<sup>27</sup> The framework of China's civil law system has been significantly influenced by German Civil Law, and Taiwanese legal scholars have also been influential because they translated and introduced German Civil Law concepts to China.

<sup>28</sup> Gongsi Fa.

<sup>29</sup> Danbao Fa chs 3, 4, 5, 7.

<sup>30</sup> Hunyin Fa.

<sup>31</sup> Jicheng Fa.

<sup>32</sup> Nongcun Tudi Chengbao Fa.

<sup>33</sup> Tudi Guanli Fa.

<sup>34</sup> Chengshi Fangdichan Guanli Fa.



and Transfer of Use Rights in Urban Land' (1990).<sup>35</sup> Within this hierarchy, however, there was (and still is) no clear distinction between public law (*gongfa*) and private law (*sifa*), and no clear distinction between property protection and government administration.

It should be noted that the Chinese Constitution is based on the 1936 Soviet Constitution, and this helps to explain why there is no formal distinction between public and private law of the kind that is found in other civil law systems.<sup>36</sup> It is therefore difficult to deal with the relationship between property law and the Constitution<sup>37</sup> and its socialist principles, and this is the underlying reason for the problematic relationship between public and private property. How property law treats public and private ownership is thus also linked to the question of whether the Property Law is itself unconstitutional (*weixian*),<sup>38</sup> or at least 'contrary' to socialist principles. In terms of the paradox of 'an authoritarian state fostering a free-market economy while espousing socialism',<sup>39</sup> some scholars from the new left wing in China do have reservations about providing 'sanctity of private property' in the Constitution,<sup>40</sup> and also highlight the importance of communal property.<sup>41</sup>

In the area of procedural law, the Administration Litigation Law<sup>42</sup> is a safeguard intended to protect ordinary people from abusive use of administrative power. Article 26 specifies that an administrative case may be brought as a 'collective suit' (*gongtong susong*) where two or more persons share the same cause of action, and their cases can be handled together. The 'collective suit' provides a mechanism for the people to protect their property rights in the form of collective action.

As analysed above, there are often conflicts between 'laws' and 'regulations' in the area of property law in China today. In order to understand such conflicts, we also need to take account of the relationship between law and party policy, as well as the relation between the central government and local governments in the process of lawmaking. In the PRC, judicial law making is tightly restricted, and the main source of law is legislation.<sup>43</sup> In addition, a complex hierarchy of law-making power and legislative organs were created as 'a highly pragmatic response to political and institutional pressures'.<sup>44</sup> As Keller has pointed out, 'the Chinese legal order therefore effectively remained split between the

<sup>35</sup> Chengzhen Guoyou Tudi Shiyongquan Churang he Zhuanrang Zanxing Tiaoli. Also see this synthesis in Huang, FX (2004) 'The Path to Clarity: Development of Property Rights in China' 17 *Columbia Journal of Asian Law* 200.

<sup>36</sup> For example, the property law provides not only private rights but also state rights. See TONG Zhiwei (2006) 'Wuquanfa (cao'an) ruhe tongguo xianfa zhimen' ('How Could the Property Law (Draft) Pass the Door to the Constitution') *Faxue (Legal Science)* 2 at 4-23.

<sup>37</sup> See eg *ibid*; HAN Dayuan (2006) 'You wuquanfa cao'an de zhenglun xiangdao de ruogan xianfa wenti' ('Some Constitutional Questions in the Debate over Wuquanfa (Draft)') *Faxue* 24-32.

<sup>38</sup> For example, the debate over whether China should have property law was extremely heated before the NPC and National Committee of CPPCC Annual Sessions in March 2006. Professor GONG Xiantian at Beijing University submitted a public letter to the Legislative Affairs Committee of the NPC in August 2005, and denounced the draft of the Property Law as unconstitutional and contrary to socialist principles. This fuelled the debates and delayed the subsequent drafting and reviewing processes. As a result the draft was not passed by the NPC Standing Committee in 2005 as scheduled.

<sup>39</sup> See the interview with WANG Hui in Pankaj Mishra, 'China's New Leftist' *The New York Times* 15 October 2006.

<sup>40</sup> See eg CUI Zhiyuan (2003) 'Caichanquan yu xianfa zhi guanxi de bijiao yanjiu' ('A Comparative Study of the Relationship between Property Rights and the Constitution') *Dushu (Reading)* 4.

<sup>41</sup> See Mishra 'China's New Leftist' *supra* n 39.

<sup>42</sup> Xingzheng Susong Fa, promulgated by the NPC on 4 April 1989 and implemented on 1 October 1990.

<sup>43</sup> Keller, P (1994) 'Sources of Order in Chinese Law' 42 *American Journal of Comparative Law* 712.

<sup>44</sup> *Id* at 714.

formal legal powers of the NPC, which symbolised the unitary nature of the state, and the administrative power of the central and ... [provincial] bureaucracies to issue and enforce normative documents'.<sup>45</sup> In these circumstances, whether informal institutions are successful or get legalised largely depends on the attitudes of local governments, which can either facilitate or obstruct their emergence.<sup>46</sup>

Laws are often simply ignored by local governments in the contemporary PRC. For example, in March 2004 article 13 of the Constitution was amended, requiring the government to compensate citizens when their private property is resumed for public use.<sup>47</sup> However, local government (in particular the demolition and eviction management department or office) often sets its own standards for compensation, which are very low in most cases.<sup>48</sup> Apart from unfair compensation, there is often a lack of consultation and a shortage of notice given, so as to prevent residents allying with each other and taking collective action (such as through petition or litigation) against the project. There are few opportunities for ordinary people to negotiate with either the developers or the local government.

Globalisation — especially entry into the WTO — has brought important changes to lawmaking in China in recent years. At the international level, China has signed and ratified many international conventions in relation to human rights, including the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>49</sup> China has also signed, though not yet ratified,<sup>50</sup> the International Covenant on Civil and Political Rights.<sup>51</sup> Article 11 of the ICESCR guarantees 'the right of everyone to an adequate standard of living ... including adequate food, clothing and housing, and to the continuous improvement of living conditions'. At the national level, 'protection of human rights' has been incorporated into the Constitution (article 33, as amended 2004).

Yet local regulations and normative documents can be seen even to the inexperienced eye to contravene such international obligations. For example, the 2001 Regulation is in breach of the ICESCR, especially 'the right of adequate housing' (article 11, paragraph 1). In the ICESCR and relevant UN documents, 'the right of housing' and human rights are closely linked: 'forced evictions [are a gross] violation of human rights ... the right of

<sup>45</sup> Id at 723. Normative documents refer to 'guizhang'.

<sup>46</sup> A typical example of the success in individual co-operative housing construction is in Wenzhou, Zhejiang Province, because of the strong business associations, local finance and support from local government in Wenzhou.

<sup>47</sup> Art 13 of the Constitution (amended in 2004) states: 'The lawful private property of citizens may not be encroached upon; by law, the state protects citizens' rights to own private property and the rights to inherit private property; the state may, for the public interest, acquire or requisition citizen's private property for public use, and pay compensation in accordance with law.'

<sup>48</sup> Pils, E (2006) 'Land Disputes, Rights Assertion, and Social Unrest in China' 19 *Columbia Journal of Asian Law* 251. The compensation for farmers is generally even lower than that awarded to urban residents.

<sup>49</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A(XXI) of 16 December 1966, entered into force 3 January 1976. On China's implementation of the ICESCR, see eg Choukroune, L (2005) 'Justiciability of Economic, Social, and Cultural Rights: the UN Committee on Economic, Social and Cultural Rights' Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights' 19 *Columbia Journal of Asian Law* 1.

<sup>50</sup> On the ICCPR and China's possible ratification, see eg SUN Shiyan (2007) 'The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification' 6 *Chinese Journal of International Law* 1.

<sup>51</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A(XXI) of 16 December 1966, entered into force 23 March 1976.

adequate housing ... includes the right to be protected from forced eviction'.<sup>52</sup> Some of the procedural safeguards required by the ICESCR cannot be found in Chinese national laws and local regulations.<sup>53</sup> Enforcement of the obligations in international conventions is still difficult in China.

## ACCESS TO JUSTICE

### Administrative Adjudication and Reconsideration

The above sections have identified flaws and loopholes in the legal framework concerning housing demolition and forced eviction, and the further question therefore arises: can people seek remedies and get access to justice when their property rights are infringed upon, especially by public power? According to the 2001 Regulations (article 16), if evictors and evictees cannot achieve an agreement on compensation and relocation, demolition and eviction management departments may adjudicate (*caijue*)<sup>54</sup> the disputes. When demolition and eviction management departments are the evictees, the disputes will be adjudicated by the people's court at the same administrative level as the demolition and eviction management department. According to article 16(2) of the 2001 Regulations, an unsatisfied party may appeal to the people's court against an adjudication outcome. However, housing demolition may continue while the appeal is pending. The Ministry of Construction issued in 2004 'Procedures for Administrative Adjudication Regarding Urban Housing Demolition'.<sup>55</sup> According to these Procedures, if a large number of residents disagree with the compensation and relocation package, a public hearing should be held (article 7), and evictors are forbidden to use forced measures in housing demolition such as cutting off water, electricity, gas and heating (article 24).

If either party (usually the residents) is disappointed with the decision of administrative adjudication, the unsatisfied party can do two things to challenge the decision.<sup>56</sup> The first is to apply for administrative reconsideration (*xingzheng fuyi*)<sup>57</sup> of the decision. The other is to file suit against the decision in court.<sup>58</sup> If residents are not happy with the result of administrative reconsideration, they may appeal to the court for administrative litigation (*xingzheng susong*).<sup>59</sup> But neither administrative adjudication nor administrative reconsideration provides adequate remedies for residents. Disputes over housing

<sup>52</sup> Office of the High Commissioner for Human Rights 'Fact Sheet No 25, Forced Evictions and Human Rights' available at: <http://www.unhchr.ch/html/menu6/2/fs25.htm#2>.

<sup>53</sup> See Davis and Lin 'Demolished' *supra* n 22.

<sup>54</sup> Administrative adjudication (*xingzheng caiju*) is the adjudication of disputes between equal civil entities by the administrative authority that administers the disputed issues.

<sup>55</sup> Chengshi Fangwu Chaiqian Xingzheng Caijue Gongzuo Guicheng, promulgated by the Ministry of Construction on 30 December 2003, implemented on 1 March 2004.

<sup>56</sup> See the 'Procedures for Administrative Adjudication Regarding Urban Housing Demolition' (the Procedures) art 16.

<sup>57</sup> See Xingzheng Fuyi Fa (The Administrative Reconsideration Law) arts 12-15, promulgated by the Standing Committee of the NPC on 29 April 1999, implemented on 1 October 1999. Art 12: 'any applicant, who refuses to accept a specific administrative act of the department under local people's government at or above the county level may apply for administrative reconsideration to the people's government at the same level; an applicant may also apply for administrative reconsideration to the competent authority at the next higher level.'

<sup>58</sup> The Procedures art 16.

<sup>59</sup> The Administrative Reconsideration Law (1999) art 5.

demolition and eviction are adjudicated by demolition and relocation management departments in the first place, and these departments often have a close relationship with the evictors. Secondly, the Administrative Reconsideration Law provides that only concrete administrative acts (*juti xingzheng xingwei*) may be reviewed,<sup>60</sup> which means that the legality of local regulations (such as the 2001 Regulation) as the basis of housing demolition and forced eviction may not be challenged.

### **Administrative Litigation and Mediation**

Administration litigation is a possible channel by which ordinary people might seek remedies when their property rights are infringed upon.<sup>61</sup> Most administrative litigation cases now involve disputes over land use, forestry, urban planning and real estate, as the ambiguity of property rights has become the main reason for people to initiate such litigation. But the role of administrative litigation for the protection of private property rights is limited, because according to the Administration Litigation Law, the courts can only review concrete administrative acts (article 11): they have no power to review 'the appropriateness of an act',<sup>62</sup> nor laws and local regulations.<sup>63</sup>

Mediation is prohibited in administrative litigation.<sup>64</sup> But Chinese judicial authorities are now encouraging the use of alternative dispute resolution to resolve administrative litigation cases.<sup>65</sup> Xiao Yang, former president of the Supreme People's Court, in a speech on 29 March 2007,<sup>66</sup> stressed the need to adopt new mechanisms to deal with administrative litigation disputes, particularly those relating to 'mass administrative disputes' (*qunti xing xingzheng zhengyi*) such as land acquisition and housing demolition. Xiao called for the Supreme Court to issue judicial interpretations on the phenomena of co-ordination (*xietiao*) and settlement (*hejie*) in order to deal with administrative disputes properly. Introducing mediation to administrative cases is a double-edged sword, however: on the one hand, more mechanisms are provided to resolve administrative litigation cases; on the other, it can be seen as an effort to divert sensitive cases affecting a lot of people and attracting much social attention such as land seizure and housing demolition out of the courtroom.

Introducing mechanisms of mediation attempts to prevent the interference of local government in administrative cases. But if cases are 'settled', another door will be opened for local government to put pressure on the case, especially in light of the problems of China's laws and regulations. The crux of China's legal system is the single 'political-legal system' (*zhengfa xitong*) which includes not only the courts but also the political-legal

<sup>60</sup> Id art 7.

<sup>61</sup> Administrative litigation is also an important perspective to investigate the reshaped relation between the state and society in post-Mao China. The Administrative Litigation Law was passed in April 1989 and implemented in October 1990.

<sup>62</sup> See eg Peerenboom, R (2002) *China's Long March Toward Rule of Law* Cambridge University Press at 420. On administrative litigation in China, see eg PEI Minxin (1997) 'Citizens v Mandarins: Administrative Litigation in China' *The China Quarterly* 420-24.

<sup>63</sup> Normative documents are not binding on the court.

<sup>64</sup> The Administrative Litigation Law art 50.

<sup>65</sup> On this issue, also see Palmer, M (2009) 'Compromising Courts and Harmonizing Ideologies: Judicial Mediation in Post-Deng China' in Harding, A and Nicholson, P (eds) *New Courts in the Asia-Pacific Region* Routledge.

<sup>66</sup> See XIAO Yang's speech at the fifth National Administrative Adjudication Conference on 29 March 2007, available at: <http://www.court.gov.cn/news/bulletin/activity/2007033000020.htm>.

committee of the Chinese Communist Party, procuratorates, police, prison and the forced labour system.<sup>67</sup> In such a system, any law should accurately reflect the concurrent party policy. The Supervision Law (2006)<sup>68</sup> has not made any difference to this situation. Under this law, the Standing Committees of People's Congresses have the power to supervise the government, people's courts and people's procuratorates, but these congresses are all 'state organs under the leadership of the party'.<sup>69</sup> In this system the judiciary lacks autonomy, and their rulings are constrained by local party organs (such as the political-legal committees) and local governments.<sup>70</sup> Judges are on the government payroll, and listed in *bianzhi*<sup>71</sup> as civil servants.<sup>72</sup>

## CONCLUDING REMARKS

From the above analysis, we can see that the very meaning of 'private property' is ambiguous and there are still few remedies and procedures available to protect private property rights in the contemporary Chinese legal system. The judicialisation of the Constitution may offer the possibility of changing the situation: ordinary people are able to lodge litigation to correct any infringement upon their constitutional rights by abusive government power and the ineffective protection of their constitutional rights by the court. Indeed there have been several positive moves in this direction: private property rights were incorporated into the Constitution in 2004 as one kind of constitutional right, and ordinary people can challenge public authorities through administrative litigation when their rights are infringed. Now they should even be given the opportunity to pursue constitutional litigation. But that raises questions about the specific mechanisms for such litigation. For example, who would file suit, and at what stage of the process of property confiscation should a suit be brought?

In terms of the question of the enforceability of private property rights in the Chinese Constitution, there are many barriers to enforcement. For one thing, there is still a fundamental imbalance between public power (*gongquan*) and private rights (*siquan*). The focus of this article has been land requisition and housing demolition, providing a lens through which to examine state requisition as an example of the vulnerability of Chinese private property rights to public power. This shows that in reality private property does not yet have the same protection as public property. Even in the case of land acquisition

<sup>67</sup> On the political-legal system in China see eg Tanner, MS (1999) *The Politics of Lawmaking in Post-Mao China: Institutions, Processes, and Democratic Prospects* Clarendon Press.

<sup>68</sup> Geji Renmin Daibiao Dahui Changwu Weiyuanhui Jiandu Fa (The Supervision Law of the Standing Committee of the People's Congress at Different Levels), promulgated by the standing committee of the NPC on 27 August 2006, implemented on 1 January 2007.

<sup>69</sup> See 'Keep a Close Watch', State Council Information Office of the PRC, 1 October 2006, available at: <http://www.scio.gov.cn/zgxywybd/en/2006/19/200610/t101717.htm>.

<sup>70</sup> The 'Seed Case' (*Zhongzi An*) in Henan is a typical example illustrating the lack of autonomy of the judiciary. In this case, a judge ruled that the regulation promulgated by the Provincial People's Congress went against the regulation promulgated by the Standing Committee of the NPC, and this judge was removed from her post. On this case, see eg Yardley, J (2005) 'A Judge Tests China's Courts, Making History' *The New York Times* 28 November, available at: [http://www.nytimes.com/2005/11/28/international/asia/28judge.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2005/11/28/international/asia/28judge.html?pagewanted=1&_r=1).

<sup>71</sup> The *bianzhi* system refers to organisation establishment and staffing: each organisation is allocated a certain personnel quota and relevant official posts. On the *bianzhi* system, see also Foster KW (2002) 'Embedded within State Agencies: Business Association in Yantai' *The China Journal* 45-48.

<sup>72</sup> It should be noted that most judges in most countries are paid by the government. In Europe (the UK is an exception) judges are rather like civil servants. But Chinese judges are embedded in the one-party system.

for 'public interest', fair compensation should be provided, and this principle should be integrated into the Constitution followed by specific and enforceable mechanisms provided in property law. Without genuine 'fairness principles', the revival of private property is limited by the difficulties encountered in enforcing private property rights. Moreover, many ideological issues have to be dealt with: equal protection for public and private property is still regarded as unconstitutional by some Chinese legal theorists. The process of law-making in China shows a pattern in which 'reality' pushes the law to reform, and it struggles to strike a balance between party policy and law as well as between central and local law-making.<sup>73</sup> Therefore to examine the right to private property and its enforcement we need to look at the political and institutional contexts.

<sup>73</sup> One of the most significant examples of this practice surfaced in 1987, when the Party approved and experimented with the grant of land use rights in selected localities such as Shenzhen, although this practice obviously contravened the Constitution. The first auction of land use rights in Shenzhen was on 1 December 1987; four months later, on 12 April 1988, the Constitution was amended to allow the transfer of land use rights (art 10, clause 4).



## GLOSSARY OF CHINESE TERMS

English Translation	Chinese Characters	Pinyin Romanisation
administrative adjudication	行政裁决	<i>xingzheng caiju</i>
administrative litigation	行政诉讼	<i>xingzheng susong</i>
administrative means	行政手段	<i>xingzheng shouduan</i>
administrative reconsideration	行政复议	<i>xingzheng fuyi</i>
adjudicate	裁决	<i>caijue</i>
concrete administrative acts	具体行政行为	<i>juti xingzheng xingwei</i>
collective suit	共同诉讼	<i>gongtong susong</i>
coordination	协调	<i>xietiao</i>
forced eviction	强制拆迁	<i>qiangzhi chaiqian</i>
individual economy	个体经济	<i>geti jingji</i>
judicialisation of the Constitution	宪法司法化	<i>xianfa sifa hua</i>
land acquisition	土地征收	<i>tudi zhengshou</i>
married the daughter twice	一女二嫁	<i>yi nu er jia</i>
mass administrative disputes	群体性行政争议	<i>quntixing xingzheng zhengyi</i>
normative documents	规章	<i>guizhang</i>
organisation establishment and staffing	编制	<i>bianzhi</i>
private	私	<i>si</i>
private economy	私营经济	<i>siying jingji</i>
private law	私法	<i>sifa</i>
private rights	私权	<i>siquan</i>
public	公	<i>gong</i>
public interest	公共利益	<i>gonggong liyi</i>
public law	公法	<i>gongfa</i>
public power	公权	<i>gongquan</i>
QI Yuling	齐玉苓	
requisition of land use rights	土地使用权征用	<i>tudishiyongquan zhengyong</i>
savage eviction	野蛮拆迁	<i>yeman chaiqian</i>
settlement	和解	<i>hejie</i>
the nailed down house	钉子户	<i>dingzi hu</i>
the political-legal system	政法系统	<i>zhengfa xitong</i>
the 'Seed Case'	种子案	<i>Zhongzi an</i>
the temporary living permit	暂住证	<i>zanzhu zheng</i>
three supremes	三个至上	<i>sange zhishang</i>
the state-owned land use rights certificate	国有土地使用权证	<i>guoyoutudi shiyongquan zheng</i>
unconstitutional	违宪	<i>weixian</i>
XIAO Yang	肖扬	